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IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF LOUISIANA
AT NEW ORLEANS

IN RE: VIOXX PRODUCTS) Case No. MDL 1657
LIABILITY LITIGATION) March 1, 2012
) Status Conference
) & Motions

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE ELDON E. FALLON
UNITED STATES DISTRICT JUDGE

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1 NEW ORLEANS, LOUISIANA; THURSDAY, MARCH 1, 2012

2 9:25 A.M.

3 THE COURT: Be seated, please. Good morning, ladies
4 and gentlemen.

5 Let's call the case, please.

6 THE CLERK: MDL 05-1657, in re: VIOXX Products
7 Liability litigation.

8 THE COURT: Counsel make their appearances for the
9 record, please.

10 MR. MARTIN: Good morning, Your Honor. My it please
11 the Court, Douglas Martin for Merck.

12 MS. OLDFATHER: Good morning, Your Honor. Ann
13 Oldfather for certain plaintiffs and as liaison counsel No. 2.

14 MR. HERMAN: May it please the Court, Russ Herman for
15 certain plaintiffs, speaking in third place.

16 THE COURT: Okay. This is our monthly status
17 conference. I have either a cold or getting over a cold or the
18 flu or something. So, I'm okay, I just don't sound okay.

19 I met with counsel for the parties to talk about
20 this meeting. This is our scheduled meeting to discuss the
21 status of the case.

22 I have a monthly status conference agenda, and
23 I'll take them in the order that is given to me.

24 Special master and deputy special masters, there's
25 no report from them.

1 MR. MARTIN: That's correct, Your Honor. I believe Mr.
2 Juneau at the last status conference indicated that he would
3 attend status conferences when an issue arose that would require
4 his involvement. And so he is not here today because there are
5 no issues requiring his involvement.

6 I think probably what we'll do in the future is
7 take that off the agenda, unless an issue does arise.

8 THE COURT: That's fine. Both the special master and
9 deputy special masters are vital to the litigation, but their
10 role in the litigation has now ceased. And so, if it becomes
11 necessary again, we'll reactivate them. But, until such time,
12 they are discharged from their duties.

13 Anything on class actions?

14 MR. HERMAN: No, Your Honor.

15 THE COURT: State/Federal Coordination, anything on
16 that from the liaison committee?

17 MS. BARRIOS: Good morning, Your Honor. Thank you.
18 Dawn Barrios for the State/Fed Committee.

19 Your Honor just to go back to II on the class
20 actions, we have prepared and sent to Merck for its
21 consideration an amended complaint for the DC consumer class.
22 And Mr. Biesner and I will be speaking about that later.

23 On the State/Federal Committee side, there's been
24 no PTOs filed since the last conference. We continue to update
25 the database, remove cases and plaintiffs that have been

1 dismissed.

2 We still have some derivative claimants that have
3 not been dismissed, although the principal consumer has been
4 dismissed. I'm working with Ms. Wimberly on getting that done.

5 THE COURT: Okay, thank you.

6 And our pro se coordinator.

7 MR. JOHNSTON: Your Honor, Bob Johnston, curator for
8 the pro se plaintiffs.

9 The only information to provide to the Court is
10 those cases, we continue to get and we continue to get them.
11 Essentially, you're dealing with the pending motion to dismiss,
12 and we do our best to try to explain the circumstances of that.

13 THE COURT: Okay.

14 MR. JOHNSTON: But nothing else to report.

15 THE COURT: All right. Well, thank you very much, and
16 thanks for your help.

17 MR. JOHNSTON: Sure.

18 THE COURT: This is always an important role. Those
19 plaintiffs who do not have attorneys need to be able to talk to
20 someone, and you've been very helpful to them.

21 MR. JOHNSTON: Thank you, Your Honor.

22 THE COURT: Government actions. Anything?

23 MS. BARRIOS: Your Honor, Dawn Barrios again.

24 We're going to have a status conference for the
25 government actions immediately following whatever hearings on

1 motions you have today.

2 THE COURT: Right. I have a status conference set, and
3 I'll be talking with everybody about that.

4 Third-party payroll.

5 MR. HERMAN: Your Honor, if I might, I'd like to
6 introduce to the Court Counsel Pat Stueve of the bar of
7 Missouri, is here in court to be introduced to the Court. He is
8 counsel in the Missouri Deceptive Trade Practice Act claim,
9 which will proceed to trial in May. And I just would at this
10 time like to --

11 MR. STUEVE: Morning, Your Honor.

12 THE COURT: Welcome to the court. We look forward to
13 your work. I know it's going to be an interesting voyage for
14 you.

15 Take a look at the website that we have. We've
16 got a bunch of stuff on it that might be of help to you. It's
17 accessible to you. Russ or somebody will give you a link that
18 you can get on, if you will. You can see what we've been doing.
19 And, any material that you need, just print off. It should be
20 helpful to you.

21 MR. STUEVE: Thank you very much, Your Honor.

22 THE COURT: Good. Good luck to you.

23 MR. STUEVE: Thank you.

24 MR. HERMAN: May it please the Court. Your Honor,
25 since the last status conference, we've had five meetings,

1 allocation committee meetings, either by telephonic conference
2 or in person. Our work is almost complete.

3 We have two matters that we have presently under
4 consideration. I would expect, by the end of next week, the
5 allocation committee will meet by telephonic conference, and
6 hopefully we can present to you our unanimous recommendation at
7 that time.

8 THE COURT: Okay. Thank you.

9 The only thing we have then is the pending motions
10 involving some of the PT 28, 29 and 43 cases.

11 Anything on appeals? There are no appeals.

12 MR. HERMAN: No, Your Honor.

13 But I would like -- Chris Seeger, Andy Birchfield
14 and I have conferred, and we are jointly going to recommend to
15 the PSC that all holdback fees on any case that Ms. Oldfather
16 has egress of will be waived, expected at a PSC meeting formally
17 in the next week. Participation by telephone, but it will be
18 recorded in the minutes. We'll report to you at that time, and
19 then report hopefully to Ms. Oldfather and Mr. Marvin. And that
20 should cure many concerns, at least as to that inventory.

21 We will not waive or suggest a waiver with regard
22 to third-party consumer or AG matters.

23 THE COURT: Okay. All right.

24 The next status conference then will be April
25 27th. April 27th, we'll start at 8 o'clock in chambers, and

1 we'll be in court at 8:30.

2 Let's go to the motions at this point. I have
3 four motions before me. Merck's what they call straggler motion
4 regarding certain VIOXX claimants who have not resolved their
5 estate issues.

6 As I understand, there's only one left. What's
7 the status of that, Dorothy?

8 MS. WIMBERLY: Your Honor, that hearing is taking place
9 in state court today. So we should get the appropriate
10 paperwork and orders out of that.

11 What we would like to is to roll this, rather than
12 to April 27th, to your next regular hearing date of March 14th
13 where we have a couple of other matters set.

14 THE COURT: Let's do that then.

15 MS. WIMBERLY: I'll submit an order.

16 THE COURT: Good. All right.

17 The motion to withdraw regarding Gerald Wagganer
18 and to dismiss the case regarding Gerald Wagganer.

19 MS. HORN: Good morning, Your Honor. Elaine Horn here
20 for Merck on that motion.

21 In the *Wagganer* case, the attorney of record in
22 that case has filed a motion to withdraw as counsel based on the
23 inability to receive communications back from the client. And,
24 as we've done in some other cases in that instance, we have
25 filed a cross motion to dismiss. Because this Court has

1 previously decided that in the circumstances where the plaintiff
2 has essentially abandoned the case the case should be dismissed.
3 There's been no response to our cross motion, so we'd ask the
4 case be dismissed.

5 THE COURT: Yeah, I don't have any choice. This is one
6 that has been with us a long time. I grant the motion.

7 The next one is Merck's motion seeking a
8 comprehensive scheduling order for the other injury cases in the
9 PT 29 cases.

10 MR. MARTIN: Your Honor, there are about 75 cases that
11 remain in the litigation. And, the injuries in those cases, I
12 can break down for Your Honor.

13 Approximately --

14 THE COURT: Out of 50,000, that's pretty good.

15 MR. MARTIN: Yes. Plus, you add your tolling
16 claimants, that's above 60,000. Right. We're down from 60,000
17 to 75.

18 Of the 75 cases, about 30 of them or so are BTEs,
19 DVTs or pulmonary embolisms.

20 The next group of cases are the heart attack and
21 stroke cases. There are approximately 10 we believe that are
22 heart attacks, another seven or eight that are strokes, and
23 we're working through those.

24 That brings us to the balance of the cases, some
25 25 or so cases, that involve injuries other than PEs, other than

1 DVTs and other than heart attacks or strokes.

2 For those other injuries, which range from
3 congestive heart failure to complaints about renal injuries,
4 gastrointestinal injuries, we have moved in connection with
5 those cases for a scheduling order that would be put in place so
6 that we can see the end of the road and have deadlines in place.

7 Specifically, we would ask the Court to go ahead
8 and put that order in place. That would require the plaintiffs
9 to come forward with expert reports that would be able to be
10 measured against *Daubert*.

11 As you know, Your Honor, we did have a Lone Pine
12 order in effect, but the Lone Pine order did not call for
13 *Daubert*-worthy expert reports. But we think we've reached the
14 stage where the expert reports, if they indeed are going to be
15 brought forward, should be able to be tested against *Daubert*.

16 And, indeed, going back to the Lone Pine reports,
17 in a number of instances, those who submitted the Lone Pine
18 reports or signed the Lone Pine reports said they were not by
19 signing that report agreeing to testify in court.

20 So we're at the stage now where we do need to know
21 really whether they want to proceed with those cases. So,
22 again, we would ask that a scheduling order be put in place for
23 those cases.

24 MS. OLDFATHER: Good morning, Your Honor. Ann
25 Oldfather, liaison counsel for certain cases.

1 Your Honor, just to back up just a bit before
2 addressing this motion and to give a brief update for those on
3 the phone, if I could --

4 THE COURT: Yes.

5 MS. OLDFATHER: -- on the status of the remaining
6 personal injury cases.

7 We filed this morning a new case census. And we
8 will, as has been our habit, circulate it to everybody on this
9 list once we get back to the office.

10 And it shows a total of 74 cases that are broken
11 down into the categories of heart attacks, 14; stroke/TIA, 13;
12 VTE, venous thromboembolism, 29; and other injury, 18.

13 And, as the Court knows and as counsel knows, but
14 for the benefit of those on the phone, these are categories that
15 are based upon our review of the filings by those plaintiffs.
16 They are not meant to be represented as a determination the
17 Court has already made about what a person's injury is, but this
18 is for case management purposes.

19 We've also been told that, in the interim, since
20 the January status conference, that Merck has resolved 17 more
21 cases. Sixteen of those are cases of Ron Benjamin's that have
22 been or are in the process of being resolved. And another case
23 was a pro se plaintiff, Mr. John Stafisz, and his case has also
24 been settled by Merck.

25 For the benefit of those pro se plaintiffs, I

1 would just like to communicate to them that Merck's counsel has
2 expressed a willingness to talk with them about the resolution
3 of their cases if they would like to approach Merck in that
4 regard.

5 And, in response to the motion that's now been
6 filed by Merck, I am standing in opposition in my role as
7 liaison counsel and as lead counsel for a group of these
8 remaining plaintiffs. We do not have any of our plaintiffs in
9 this group. We do have some plaintiffs who are now in the VTE
10 group, but they haven't been mentioned in the exhibit that Merck
11 has tendered along with the scheduling order.

12 We agree completely, Your Honor, that a scheduling
13 order needs to be in place, and we think it's 100 percent
14 appropriate to do that.

15 This particular scheduling order cuts off written
16 discovery too soon, particularly given the fact that there has
17 not been any general causation developed yet for these
18 plaintiffs. The efforts that these plaintiffs are going to make
19 to develop general causation experts should be able to take
20 advantage of what we are doing right now in the VTE cases.

21 As I'll get to when we address the VTE motion, I
22 believe that the experts we are working with there will be able
23 -- I hope they will be able -- to submit general causation
24 reports. And I believe that, if they do, that the science and
25 the signals behind those reports would also support many of

1 these other claimants.

2 THE COURT: Have you submitted a scheduling order that
3 you feel is appropriate?

4 MS. OLDFATHER: No, Your Honor, I haven't.

5 THE COURT: Let's do that then. And I'll take a look
6 at both of them. And I'll issue a scheduling order in this
7 case.

8 MS. OLDFATHER: All right.

9 Ours, Your Honor, will have an uncertain start
10 date depending upon when the general causation expert report is
11 filed.

12 Your Honor, I also failed to look at my notes. I
13 meant to, in the very beginning, introduce Ms. Baum, who is one
14 of these other plaintiffs. And, as we left chambers, I heard
15 from Mr. Escandon that she is here today and present in the
16 courtroom.

17 THE COURT: Would you come forward, please, ma'am.

18 Since you've made the trip, you ought to be able
19 to address your Court.

20 MS. BAUM: Your Honor, thank you for allowing me to
21 speak on behalf of myself and many other damaged VIOXX injury
22 plaintiffs who gave up against Merck and Company because they
23 were told they had no chance of ever getting any doctor to give
24 them the required case-specific expert opinions or they could
25 not get any attorneys to represent their cases.

1 On September 1, 2010, my Boston Medical Center
2 cardiologist, Dr. Eric Audrey, provided Merck and Company the
3 case-specific expert opinion for my case to move forward. That
4 was over a year and a half ago, and I've still not had any
5 contact or anything from Merck. The only contact I've had has
6 been from Ms. Oldfather.

7 My Boston doctors ruled out other causes of my
8 vascular heart issues except with one exception, which came
9 first, the VIOXX usage or the hypertension. The medical records
10 show the timing of my worsening extreme fatigue and spiking
11 hypertension was when the VIOXX was began in 1999, hypertension
12 medication ended -- or started in September 2002.

13 THE COURT: Are you working now?

14 MS. BAUM: No, I'm no longer working. My first
15 attempt, I was -- I stated last year that I had two more health
16 issues caused by Merck's product Fosamax --

17 THE COURT: What were those, ma'am?

18 MS. BAUM: I had added my hand issues. I've had six
19 surgeries on my hands. And that's from my hands being too
20 brittle from taking Fosamax.

21 Th original occurred on my birthday, September --
22 I'm sorry -- August 30th, August 30th 2004. And it was in a
23 handshake while I was a greeter from church, and the hand was
24 broken.

25 And, at the same time, I was taking Fosamax and

1 VIOXX. The Fosamax made my bones too brittle, for the last
2 previous two years' use. VIOXX made the -- prevented the oxygen
3 needed to be -- to get to the areas where the injury was healed.
4 So, therefore, my hands are very disabled.

5 But I went through three Social Security
6 disability tests this past spring, or in 2011. And the first --
7 the three doctors, it was inconclusive that my six hand
8 surgeries would be determined permanently disabled.

9 However, they ordered a fourth test, that was a
10 Doppler ultrasound of my left big toe, that proved that I have
11 heart damage that led to my permanent disability.

12 The heart damage, I have no circulation to my toe.
13 They couldn't get a pressure at all.

14 And, with that, I want to continue on.

15 I vowed last year to get to the end -- get to the
16 bottom of why I was billed as a Medicaid client. And, in my
17 research, I've found out far more than I ever intended.

18 I knew it had to do with some brokers that are
19 Wells Fargo insurance brokers in Fort Wayne, Indiana, the fourth
20 largest brokerage firm in the entire world. Both of them were
21 independent brokers with very small agencies that I worked with
22 at four separate employers.

23 I kept asking why me, and the only common
24 denominator was those two brokers who led to me getting a
25 completely healthy diagnosis, no sign of pulmonary hypertension

1 in Fort Wayne, Indiana on July 27, 2009.

2 About then days later at work -- and this was
3 purely by an act of God. I was a benefits administrator for my
4 100 percent Medicaid-funded employer. And at that time I was
5 waiting for a family medical leave paperwork to process for an
6 employee, and I got a fax from that doctor's office that gave me
7 the healthy heart diagnosis ten days before. And I have a copy
8 of it here, Your Honor, because these apparently have been
9 omitted from my medical records submitted to the courts.

10 Medical record tampering is definitely in process
11 under my case. And I have the printed copies to prove it.

12 The facts that I've uncovered, money laundering of
13 Medicaid claims was test-marketed at my employer of 24 years.
14 Strategic planning led to the creation of RX Partners.

15 In 1998, four invested \$50,000 and one invested
16 \$25,000 for a period of ten months in RX Partners. Ten RX
17 Partners purchased the RX files of four of my employers'
18 non-profitable stores that they had closed.

19 Fact, ten months later, RX partners sold to
20 Supervisor Scotts in Fort Wayne for \$18 million. Each RX
21 partner that invested \$50,000 walked away with \$4 million in
22 that ten month period, and the \$25,000 investor walked away with
23 2 million.

24 I worked as benefits administrator with those two
25 brokers at four separate employers. Both of their agencies were

1 purchased by Acordia Brokerage of Indianapolis. Their names are
2 James Emajock and John E. Ryan. Both are executive senior VPs
3 for Wells Fargo.

4 Strategic planning led to two -- Acordia
5 purchasing two other property and casualty long-term disability
6 firms locally. So there are other brokers locally in Fort Wayne
7 that are also part of this.

8 Acordia Brokerage became so profitable that they
9 were acquired by Wells Fargo in approximately 2001.

10 Wells Fargo was created to handle the profitable
11 insurance industry arm of Wells Fargo. Wells Fargo Insurance
12 Services is the world's number four largest insurance brokerage.
13 Acordia took over the Federal Employee Benefit Union in 1994
14 with a self-funded plan. Wells Fargo Insurance has majority
15 shareholdings in 42 plus percent of all medical entities at all
16 levels in the health care industry in the US. Wells Fargo
17 Insurance has majority shareholders in Medicaid outsourcing
18 contracts, 40 out of 50 US contracts.

19 How does this apply?

20 THE COURT: I don't want to interrupt you, but how does
21 that have to do with VIOXX?

22 MS. BAUM: I'll skip over that, Your Honor.

23 How does that apply? My health was greatly
24 compromised because of the emergency care -- I cannot get
25 emergency care in Fort Wayne, Indiana, because of their massive

1 control in Fort Wayne, Indiana.

2 My computer has been hacked into -- I'm sorry --
3 that's not where I wanted to go. I'm sorry.

4 How does that apply, is that Merck has been
5 purchased through majority shareowner holdings by Wells Fargo
6 Insurance. So, locally, it was impossible for me to get health
7 care, and it was impossible for anyone else across the country
8 to get doctors. Of the original 90,000 cases that were filed,
9 no one could get medical doctors because of the monopolistic
10 control of Wells Fargo Insurance Services.

11 Locally, these doctors have threatened me,
12 personally, with the false diagnosis that would have ended in my
13 death within approximately two years.

14 I can prove all of this with findings, and I can
15 prove that my medical records were not submitted to the courts
16 as far as the ones that I know went to my attorneys that were
17 dismissed because I sent them to them. I have the printed
18 copies that I got on my own from the doctor as the fax came
19 through to my desk from that doctor's office and then requested
20 it. And then I also have the hospital records that I went the
21 next day to get. Those records are not submitted in the courts.

22 MS. OLDFATHER: Excuse me, Ms. Baum.

23 Your Honor, can I suggest, given -- just a second,
24 stay right here -- given that you've asked us to submit a
25 scheduling order on the other cases, perhaps I can work with Ms.

1 Baum, who is in that group, and she can submit her comments in
2 writing to the Court.

3 THE COURT: Okay.

4 MS. OLDFATHER: I apologize for interrupting both of
5 you, but I wasn't sure how much time you still needed, Ms. Baum,
6 and how much time the Court had.

7 MS. BAUM: Long story short, I can prove that those
8 other plaintiffs, including the 36 that they want you to dismiss
9 for the deep-vein thrombosis, the doctor that gave them Merck,
10 the opinion that it was not caused by, I can prove with research
11 from 2000 to 2001 that, yes, indeed, deep-vein thrombosis was
12 caused by taking the VIOXX. And it's all buried because of
13 Wells Fargo Insurance and two brokers locally in Fort Wayne,
14 Indiana who -- and how they've intimidated me.

15 Why I'm here is because they are threatening me
16 with my life. My face was posted on LinkedIn, LexusNexus. I
17 have a copy of it. I didn't even know what the LexusNexus group
18 was. My face was posted beside a discussion: Five Top Threats
19 to Health Care in the US.

20 And then, following that -- that was on June 28th.
21 I didn't know these existed until August 18th. Underneath the
22 June 28th posting was another one that was posted: Time to Get
23 Personal, on August 5th. That followed me returning from
24 talking to the Office of Inspector General in Washington, DC on
25 August 18th.

1 When I found that, they clearly did get personal.
2 My computer was hacked into and I could no longer access the
3 Internet. When I called about it, my -- I could prove that my
4 bill was paid, and they said it was a blocked, suspended
5 Internet access.

6 I've had emails that say: Wouldn't you rather
7 live life? I had one last week that all you could see on the
8 page that I printed out was: Yes, we do kill.

9 And there are local deaths directly tied to Wells
10 Fargo Insurance Services and RX Partners that where Medicaid
11 racketeering began at my employer. And the reason those deaths
12 have occurred is because they can prove -- they could have
13 proven to the U.S. Government and the people that control their
14 insurance over the health care industry that Wells Fargo
15 Insurance has control over everything, every level, managed care
16 services included. And that is where it stands.

17 THE COURT: Thank you for your comments, ma'am. And
18 you can meet with Ms. Oldfather, if necessary, or put that in
19 writing and send it to the Court.

20 I thank you for your presence here today. I know
21 it was difficult for you.

22 Let me hear from Ms. Oldfather.

23 Anything further?

24 MR. MARTIN: Your Honor, may I address a couple of
25 points that Ms. Oldfather made? And I'll be brief and try not

1 to belabor the point, since we also discussed this in chambers.

2 First of all, I'm happy to hear that Ms. Oldfather
3 agrees that a scheduling order needs to be put in place, but
4 what concerns me is when she also said that it would have an
5 uncertain start date. I think we need a certain start date.

6 THE COURT: I agree with that. We need to end this
7 litigation one way or the other at this point. We need to get
8 some scheduling order that's appropriate and follow the
9 scheduling order. It's got to be specific dates.

10 MR. MARTIN: I just wanted to clarify one other point.

11 With respect to the pro ses, we are willing to
12 talk to those pro ses about the prospect of a settlement where
13 there is a diagnosed heart attack or a stroke, just for those
14 injuries. Thank you.

15 MS. OLDFATHER: Your Honor, I think the next thing --

16 THE COURT: The next one was the extension of time,
17 disclose general causation experts. What is that about?

18 MS. OLDFATHER: Yes, Your Honor. There are two
19 motions. There's a motion for extension of time to disclose
20 general causation experts, which affects Merck. And there is a
21 predicate motion to compel delivery of the VIOXX concordance
22 database, which I don't believe it directly affects Merck, but
23 they've chimed in on it. It directly affects an order that
24 we've asked the Court to enter vis-a-vis the PSC.

25 Specifically, Your Honor, we've asked the Court to

1 set a date certain for the Plaintiff's Steering Committee to
2 deliver to us as promised -- and I've spelled this out in the
3 order -- the VIOXX concordance database in OCR files, image,
4 which are .tif files, and load files, which are .dat files.

5 And we had all assumed -- I know Mr. Herman had
6 assumed and we had certainly assumed and the Court had assumed
7 -- when we were here on January 5th and we set May 7th as the
8 target date for us to disclose the general causation experts, we
9 had assumed that, as continually represented throughout the
10 case, that the VIOXX depository did contain indeed not only all
11 of the documents that Merck had produced in this litigation, but
12 more importantly all of the work product on those documents that
13 had been done by literally hundreds of attorneys. Not just a
14 few firms, but over 100 firms submitted common benefit
15 applications, and there were multiple attorneys in many of those
16 firms. And a huge block of the common benefit time was review
17 and analysis of Merck's production, subjective coding of that
18 production in the concordance database, which is where it was
19 all accomplished, marking of hot documents, identifying which
20 documents went with which particular issues. So I know that
21 everyone had assumed that all of those materials were available.

22 I won't go into all of the details that's in our
23 motion and our attachments, but just to hit the broad strokes,
24 as soon as the Court set that May 7 deadline, that exact day, we
25 contacted Mr. Herman and arranged for a date for a team from my

1 office to go to the depository on January 18th and 19th.

2 When we walked in -- and this has been established
3 by an affidavit that I've submitted with our reply from our
4 technical specialist and paralegal Colleen Shields -- when we
5 walked in, Mr. Herman, who was extremely gracious during the
6 whole visit, announced that he was copying for us onto an
7 external hard drive the entire VIOXX concordance database, with
8 image files. And that he had made the decision to do that. And
9 that basically meant we could turn around and go home, because,
10 by Monday, which was January 23rd, they were sure that they
11 could deliver that us to us.

12 We nevertheless elected to stay. I said: Well,
13 let's go ahead and start looking through the concordance
14 database that's here on your system and we will start, we have
15 two days set aside and three people.

16 Well, we couldn't do that because the concordance
17 database was locked up for the loading and copying that he had
18 set out to do. And he'd actually started I think four days
19 earlier, but it was still processing through this. So they had
20 hoped that might be done in a couple of hours. As it turned
21 out, when we left on January 20th, it was only 50 percent done.

22 So, the whole time we were there, we could not
23 access the VIOXX concordance database at all. And, again, as I
24 say and the affidavit establishes, Mr. Herman fully expected
25 that we would be able to have that by January 23rd.

1 So we go home. And I've attached the email
2 threads and the letters to our motion. Ms. Herman Grisamore,
3 who is the paralegal in charge of the VIOXX depository, had a
4 personal matter the next week and she asked that we deal
5 directly with Seeger Weiss's IT folks, because she needed to
6 step out of the picture for a bit.

7 So we did. And Colleen had a number of
8 conversations with the Seeger Weiss's IT people, who told her --
9 and this is in her affidavit -- that because VIOXX was an
10 inactive case, all of the images had been deleted from the
11 servers and supposedly backed up by a contract company.

12 When they realized that, they were restoring
13 those. Because obviously they're needed. And that we should
14 have that in two days. And that went on, two days, two days,
15 three days.

16 Finally, we sent an email, and it's in the record,
17 I think it was February 10th. And we never have heard a
18 response to that email. We said if we didn't get a response by
19 February 13th with another firm commitment, we would have to
20 file a motion. Because I've got this date ticking over here.
21 And I've got three experts that I'm working with, and the
22 primary one that's doing the research is saying to me: We can
23 talk about general science in this report and we can talk about
24 general mechanisms, but we can't talk about the signal, because
25 nobody has gathered the raw data on the signal in venous events

1 or events on the venous side of the system. And that's one of
2 the many things that we need from the concordance database.

3 So we got no response. We filed the motion. I
4 honestly thought that, once I filed the motion to compel, which
5 simply asks for a date certain by which this will be delivered,
6 that we'd have it by now. But -- and I filed it a little
7 prematurely because I'm so concerned about the limited time that
8 we have.

9 But it turns out to have been the right move,
10 because nothing has happened. We've never gotten a call from
11 Mr. Seeger. I've never heard any response at all from Seeger
12 Weiss or their IT people debating what we've said in our
13 motions.

14 I'm not casting blame; okay? I am not trying to
15 say they're bad, I'm good. What I'm saying, clear as a bell,
16 is, in order to do the work that remains for not just the VTE
17 but all of the remaining plaintiffs, we need to have access to
18 the common benefit work product that was done by hundreds of
19 attorneys that we cannot replicate. And, if we have to
20 replicate it, we sure can't replicate it in three months.

21 Merck's response -- actually, the PSC'S response
22 was that time had lapsed and software and hardware had changed.
23 And this just came in Monday so I -- maybe they're saying they
24 can't do it. Which I haven't heard. But there were a lot of
25 defending in the response about, you know: I've waited too long

1 and this is at the last minute. But that was the core of it.

2 The other part of the response was that I already
3 have all these documents and I could make my own depository.
4 Well, that had to come from Merck, because I've never had a
5 conversation with anyone about that.

6 I do not, Your Honor, have all these documents.

7 During the time that I represented plaintiffs in
8 Kentucky, Merck did make what they called a universal production
9 to us. They would just send us these hard drives. They didn't
10 ever identify what specific interrogatory or request for
11 production, any of these documents were responsive to. I have
12 no clue where on there or what on there has to do with raw data
13 from clinical trials.

14 I obviously could load it into the concordance and
15 could find raw data on clinical trials, but I have no clue if
16 it's all of it.

17 This production was made in the middle of the
18 case. We have filed an exhibit showing that there have been
19 many, many productions after that that certainly have never come
20 to me.

21 But even -- and the solution there would be let
22 Merck give me its VIOXX concordance database. I mean, it has
23 loaded this all on the concordance and done its own objective
24 coding.

25 But that's not a complete solution, Your Honor,

1 because that's where the Plaintiff's Steering Committee started.
2 They got concordance objective coded documents from Merck with
3 dates and author information in it, and then they spent millions
4 of hours subjectively coding and reviewing those documents.
5 That is the work product that I'm trying to get and that
6 everybody assumed was available.

7 So my first motion is to ask the Court to set a
8 date certain by which Sieger Wise will produce that VIOXX -- or
9 the PSC, sorry -- will produce the VIOXX concordance database.
10 And the order that was tendered specifically says what we need
11 in order to be able to use it in our own software, which is an
12 easy export for concordance.

13 THE COURT: Let me hear from the PSC.

14 MR. HERMAN: May it please the Court, Russ Herman for
15 the PSC.

16 While this controversy was going on, there was a
17 film nominated for an Academy Award that nobody saw called
18 Anonymous. Has to do with who wrote Shakespeare's plays. And I
19 pulled out a book after viewing that on the mysterious Mr.
20 Shakespeare, and there's a quote in Richard, III that describes
21 the depository, and it's like this. Quote: 'Tis not as deep as
22 a well or as wide as a church door but 'twill suffice, end
23 quote.

24 Now, the facts were outlined previously, I'm not
25 going to respond to, except to give Your Honor on the record the

1 PSC's view.

2 Three years ago, Ms. Oldfather -- or about three
3 years ago -- was invited to the depository. Not just one
4 depository but three. I made that invitation.

5 There was concordance. And concordance remained
6 in effect for about two and a half years, at a cost of \$200,000
7 plus.

8 There were no visits, despite repeated
9 invitations.

10 At some point in the year 2012, learned counsel
11 opposite said that she wanted to come to the depository. I said
12 fine, the depository is open, we have everything that's been
13 produced.

14 In advance of that, learned counsel opposite
15 received the complete trial package, which also included an
16 update of all the materials that had been introduced in the
17 Louisiana Attorneys' General case, which Your Honor presided
18 over.

19 Mr. Birchfield, on a number of occasions,
20 indicated on the record, after the PSC was challenged, that we
21 didn't do any discovery regarding congestive heart failure,
22 deep-vein thrombosis, et cetera, et cetera. Mr. Birchfield
23 said: We did, we had our experts consider it; and, from our
24 point of vantage, of the 2 million plus documents we reviewed
25 and numerous experts, our experts could not conclude general

1 causation and certainly not specific causation.

2 Immediately after Ms. Oldfather made the request,
3 we set aside three days. I personally canceled everything on my
4 schedule for those three days.

5 Ms. Grisamore's daughter, my granddaughter, had a
6 medical issue. But we made sure that there was a competent
7 paralegal in the depository, knowledgeable, 24 hours, if that
8 was what Ms. Oldfather and two others maintained.

9 The concordance material, we began to process
10 those four days before they arrived. Advised that to Ms.
11 Oldfather.

12 In order that there be no problems, every two
13 hours, I went to the depository myself and said: Is there any
14 problem?

15 Every document, every single document produced is
16 in that depository, in my office. Every hard drive is in my
17 office.

18 We offered to furnish all of the hard drives to
19 Ms. Oldfather. Although, we believed that this is a replicated
20 provision. Because, after checking with other attorneys, both
21 on the PSC and Merck, we were satisfied that almost 100 percent
22 of the materials had already been produced to Ms. Oldfather and
23 indeed had been in her office for more than two years.

24 It's unfortunate that other attorneys recruited by
25 and other firms recruited by Ms. Oldfather decided not to

1 participate after affirming to her and to this Court that they
2 would.

3 Nevertheless, the PSC does not have any
4 responsibility, other than maintaining that depository. And,
5 indeed, if the request to come to the depository had been made
6 on the numerous occasions in which it was offered before the
7 concordance issue and while the concordance software was still
8 intact, then this wouldn't even be an issue. We take
9 responsibility for that.

10 Now, it is true that four days before Ms.
11 Oldfather arrived, I determined that we should begin loading or
12 attempting to load concordance software again. That process is
13 still ongoing.

14 There was no reason for us to assume a \$300,000
15 cost and continue to keep this intact until Ms. Oldfather,
16 excuse me, or learned counsel opposite, finally made a request
17 and decided to come to New Orleans.

18 As I recall, learned counsel opposite did not even
19 stay the three days. I was advised at the end of the first day
20 that she had some matter, which is fine. I understand lawyers
21 have competing obligations. But I continued to be there and
22 monitor the situation every two hours, and never heard a
23 complaint. And, indeed, had pointed out, these are the hard
24 drives, here's a computer, this is a dedicated computer to you,
25 here is an experienced paralegal in the depository dedicated for

1 your use. And I don't know why they didn't stay and continue
2 their search.

3 I do know this. That, there were DTP and
4 congestive heart failure, et cetera, documents. And it's so
5 noted by Ms. Oldfather. Mr. Birchfield has confirmed in his
6 representations to this Court.

7 I'm very distressed by this situation. I think
8 that the PSC has continued to live up to its responsibility.

9 Now, I want to make something else very clear to
10 Your Honor. We are not partners with Merck. We're adverse to
11 Merck. We are still adverse to Merck. We want plaintiffs with
12 legitimate claims to come forward and prove their claims, and
13 we're willing to assist to the extent we can.

14 But what we're not willing to do is to suffer the
15 slings and arrows of outrageous fortune with regard to the
16 depository that still exists.

17 And we invite learned counsel and all her lawyers,
18 paralegals, associates, counsel, any time. And I will give up
19 whatever else I have scheduled to be there. We will have a
20 paralegal there. We will have computers there. And we'll have
21 all the information that she needs.

22 And now I think Mr. Seeger wants to address this
23 issue.

24 MR. SEEGER: Very briefly, Judge.

25 Just, you know, I really just feel like too much

1 time has been spent attacking the PSC on this point when, you
2 know, there's litigation to be conducted. But we produced the
3 VIOXX concordance database with all of its images.

4 Now, it is true that Ms. Oldfather may have to
5 hire a consultant to help her access those databases. She can
6 call us. I know she has access to Dave Buchanan and people in
7 my office, who are more than happy to help her with that. But
8 it is possible. It is a very complex piece of machinery with a
9 lot of documents and images on it, but it's everything we have.

10 She also, as an alternative, could have come to
11 any of the depositories over the last four years and sat and
12 worked in those depositories, as hundreds of lawyers throughout
13 the country have done, and even New York and New Orleans and
14 Andy's office in Alabama and other places.

15 So, I'm really at a loss, and I don't want to
16 disadvantage her or her clients. But, at the end of the day,
17 this stuff's been there and it's been available, and we're
18 continuing to make it available.

19 I guess I feel I need to address the Court as to
20 the consequence that we're standing in the way and not helping,
21 and we're doing everything we can.

22 THE COURT: I don't know what we're talking about.
23 Ann, if you need the material and they're willing to give you
24 the material, what are we doing?

25 MS. OLDFATHER: Judge, I agree completely. And the

1 only solution here is -- there's two things. Mr. Seeger just
2 stood up and said: We have given her the VIOXX concordance
3 database with all of its images.

4 I challenge that. Could I see a transmittal
5 letter? An email? Is he standing up and saying that as an
6 officer of the court?

7 I do not have and have never been given the VIOXX
8 concordance database with all of its images.

9 Mr. Herman didn't debate anything I've said. When
10 we showed up down there, he said: We're going to give this to
11 you; it's not ready yet, it will be ready before you leave. It
12 wasn't ready before we left. You'll have it on Monday. And on
13 and on and on it went. Nothing has ever been sent to us.
14 Nothing.

15 Judge, the second thing is, would you go over
16 there with me? There are 153 external hard drives on the
17 shelves, some of which are not labeled. They have thousands of
18 gigabytes.

19 THE COURT: Well, you said they haven't sent anything
20 but they said they've sent everything.

21 MS. OLDFATHER: I've never heard them say that until
22 just this moment. When? When? Really, I would love to have
23 it. That's what I've been trying to get. That's why we filed
24 the motion. Russ stood up and said: The software doesn't work
25 anymore. Andy stood up and said: I've given it to her. I'm

1 sorry, Chris stood up.

2 MR. SEEGER: I'm actually a little confused. You
3 didn't take a hard drive from Russ's office?

4 MS. OLDFATHER: We took a took a hard drive from Andy's
5 office that is not the concordance database with images.

6 MR. SEEGER: It is. It is.

7 MS. OLDFATHER: I have a printout of that. You cannot
8 fit all of the images onto the hard drive. It is not those
9 images.

10 And, if that were it, if that were it, Judge, why
11 didn't they say that in response to a motion to compel? Wait
12 and stand up and confuse the Court about this issue?

13 THE COURT: Folks, you all are going to have to just
14 meet right now and talk about it and see where we are.

15 Ben, do you have anything on this?

16 MS. BAUM: Your Honor, could I add one more thing,
17 please?

18 THE COURT: Sure.

19 MS. OLDFATHER: Chris says he's confused, too.

20 MR. SEEGER: Oh, no. I'm confused by what you're
21 saying because I know what we gave you. We'll figure it out.

22 MS. BAUM: Here are the hard copies, printed out copies
23 of my medical records that were not submitted to Merck.

24 The first page clearly says: No cardiac disease
25 found.

1 The second page clearly states: The patient
2 tolerated -- no -- I missed the second page. I'm sorry.

3 THE COURT: What is your point about that, ma'am?

4 MS. BAUM: These are medical records that were not
5 submitted to the courts in defense to Ms. Oldfather, and that
6 goes hand-in-hand with what I was saying about Wells Fargo and
7 Merck and Company.

8 I can prove with their website, Wells Fargo
9 Shareholder Services has a direct phone contact number to Merck
10 and Company. They are primary owners by majority shareowner,
11 and that is why they are trying to silence and bury all this
12 information, because of this massive Medicaid racketeering.

13 One more thing, please?

14 THE COURT: Sure.

15 MS. BAUM: I received an email. In desperation this
16 past last week, I had sent to Erin Brockovich: My life has and
17 still is in danger from LinkedIn postings since March 2011,
18 massive Medicaid money laundering uncovered, seeking answers to
19 local substandard medical care and intentional billing me as a
20 mentally-delayed Medicaid client. My employer was a multistate
21 Medicaid-funded direct care staffing agency with the physically
22 and mentally challenged clients. I was a salaried benefits
23 administrator with over 3,000 employees. In my email, I told
24 her that I had evidence about the 36 deep-vein thrombosis.

25 She replied to me, she is currently investigating.

1 I have a direct email from Erin Brockovich, who is
2 investigating all of this, because she realizes the magnitude
3 that so many people were wrongfully dismissed because of medical
4 records were not submitted properly, attorneys were paid off.

5 My local doctor has admitted -- and I have a
6 doctor who said he will not lie for anyone -- he said, yes, his
7 practice is owned by Wells Fargo Insurance.

8 Wells Fargo Insurance owns Merck and Company.
9 There's a conflict of interest here, and the many cases and many
10 deaths were not compensated for by Wells Fargo because of Wells
11 Fargo local ties to Fort Wayne, Indiana.

12 THE COURT: All right, thank you.

13 MR. BARNETT: Morning, Your Honor. Ben Barnett on
14 behalf of Merck.

15 I want to raise two suggestions, Your Honor, to
16 try to resolve this issue, because actually Merck does have a
17 stake in this dispute, both in terms of the delay of getting a
18 schedule in place for these cases and also because Merck has
19 obviously spent millions in producing documents, both to the
20 PSC, to Ms. Oldfather and other counsel around the country.

21 To me, the answer to this dilemma is not the
22 production of a wholesale concordance database. Presumably,
23 with her work with the experts, Ms. Oldfather has a very clear
24 idea of exactly the data that her experts need in order to
25 assess whether they can render a general caution expert report,

1 and she doesn't need the entirety of the database to do that.

2 Moreover, based on the limited information in her
3 motion, it's pretty clear that she already has some sense of
4 what she wants. She wants Med Watch forms, she wants adverse
5 event reports.

6 We've gone through the production cover letters
7 from Merck's local counsel. Those materials were produced to
8 her back in 2006 and 2007. So it may be that she has this
9 material in her office already.

10 And those production letters not only identify
11 what was produced, they provide the Bates range for that
12 production.

13 So, rather than fighting over whether she's
14 entitled to a concordance database or serving new discovery on
15 Merck, which she did yesterday, some of which we answered in
16 2005 in the master document request and interrogatories before
17 Your Honor, to me, the way to do this is to identify very
18 specifically the data that her experts need in order to
19 potentially render these opinions, to identify that data, both
20 to the PSC and Merck. And, working together, we can figure out
21 where this data is. And then, to the extent that she doesn't
22 already have it, it can be provided.

23 It seems no reason to re-invent the wheel, when
24 that was done several years ago. And there's no reason to
25 further delay these DBT cases in terms of an extension of time.

1 And we're happy to do that if the Court thinks it
2 makes sense.

3 MS. OLDFATHER: Your Honor, there are some fixes, and
4 that would be one. That's not great. It helps me with the
5 experts but it doesn't get me what I would need when I try the
6 cases. But this is the first I have heard that we need a fix.

7 I mean, after we left Mr. Herman's office, we did
8 take with us a hard drive that was a copy of their VIOXX
9 computer, and I have the contents right here. There are no
10 image files on here. The entire concordance database was still
11 loading. It was not complete.

12 We would not have the string of emails that we
13 filed as an exhibit to our motion that post-date the January
14 18th visit and go into late January and into February, and
15 emails from Mr. Seeger's office continuing to promise us the
16 concordance database with the load images, emails from them
17 saying we're having a hard time getting the load images back in;
18 we thought we had them linked up but now they're not exactly
19 right, we'll have it to you the day after tomorrow. That's not
20 make-believe, Judge. Those are the exhibits we filed with the
21 Court. And that whole line of communication stopped on February
22 10th. And nobody has ever told me that it's because their
23 software is out of date, or their hardware is out of date, or
24 there's no hope.

25 I mean, that is the solution. And everyone had

1 expected that it would be easy to do.

2 I would like to do that. And now that apparently
3 Mr. Seeger is engaged -- I think he went out to get back on the
4 phone -- I would like to have the benefit of the subjective
5 coding that was done on those records with an image to look at.

6 And, Your Honor, it is true that there are
7 materials over in Mr. Herman's office, the church door and the
8 well shallow. But they're there. But the problem is, it
9 doesn't even fit to say a needle in a haystack. I mean, there
10 is no analogy for the 121st Century for the fact that there are
11 153 hard drives, over 1,000 DVDs and CDs. No workable index.
12 Just Ms. Grisamore's filing index, which is not up-to-date and
13 not detailed about what's on any one thing.

14 We found material documents on a blank hard drive
15 that we pulled out just to look at.

16 The treasure map is the work that the PSC did and
17 was paid for.

18 I don't want to fight with Mr. Seeger and Mr.
19 Herman. I want them to work with me to help me as the plaintiff
20 to have the VIOXX concordance database that they have in a
21 usable form. That's all I want.

22 THE COURT: Yeah. Well, I keep hearing they say they
23 sent it to you, you say they haven't, Merck says they'll give
24 you a refined version. Just seems like everybody's trying to
25 help.

1 MS. OLDFATHER: Judge, Merck can't give me a refined
2 version. They cannot give me any coding from the hundreds and
3 thousands of millions of hours that were already done on those
4 documents. They can't.

5 I really do not believe that Mr. Seeger is going
6 to come back in here and say that this was given to me.

7 Perhaps we can be under terms, and we can have a
8 phone conference in a week.

9 THE COURT: Let's do that. You all meet and let me
10 hear from all in a week, and we can see where we are.

11 Ben, you ought to be on the phone, too.

12 MR. BARNETT: Certainly, Your Honor.

13 THE COURT: I'll set it up.

14 MS. OLDFATHER: And, Your Honor, the motion to extend
15 the time on the VTE expert is dependent on where we end up with
16 this, and I would suggest that we hold that for the time being.

17 THE COURT: Right. I'll do that.

18 Okay. I'm going to be dealing with the scheduling
19 order, though. So get that to me within a week.

20 MS. OLDFATHER: Yes, Your Honor.

21 THE COURT: So I can put out something that everybody
22 knows where we're going. We've got to have a date certain, I
23 agree.

24 MS. OLDFATHER: Your Honor, that leaves two groups of
25 motions, both of which are noticed for March 14th.

1 One group is motions for summary judgment in two
2 cases that are based on Lone Pine reports and adequacy.

3 The other is Mr. Benjamin's motion to be relieved
4 of the obligation to pay any common benefit fee.

5 Based on our discussion in chambers, I would ask
6 that both of those be noticed or passed for the next status
7 conference and give us time to respond.

8 And we've been asked on the summary judgment
9 motions in *Escamilla* and *Kuykendall*, and certainly *Escamilla*, to
10 address the Court as liaison counsel for the attorneys of
11 record, and it would save us an extra trip down here on March
14th if we could have that past April 27th for both *Escamilla*
and the *Kuykendall* motions.

THE COURT: Let me hear counsel.

MR. MARTIN: Your Honor, Douglas Martin.

 We oppose another motion to delay even more. On
the Benjamin motion, it has been set for March 14th. A
settlement has been reached but no money has been paid. We'd
like to go forward so that we can clean that up and finalize
that. So we would ask that that motion be continued to be set
for March 14.

 And, as for the *Kuykendall* motion and *Escamilla*,
again, they're ready to be heard, and we don't think that it
should wait another six weeks.

THE COURT: Okay. All right. I'm going to keep them

on the date that's set now.

Thank you very much.

MS. OLDFATHER: Thank you, Your Honor.

THE COURT: Court is in recess.

(10:27 p.m., proceedings in recess.)

CERTIFICATE

I, Susan A. Zielie, Official Court Reporter, do hereby certify that the foregoing transcript is correct.

/S/ SUSAN A. ZIELIE, FCRR

Susan A. Zielie, FCRR